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NO. 88-1721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

L. G. McCORMICK AND
BEACON HILL FARMS, INC.,
Petitioners,

v.

TEXAS COMMERCE BANK,
NATIONAL ASSOCIATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTEENTH COURT OF APPEALS DISTRICT OF TEXAS

PETITIONERS' REPLY BRIEF

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I. THE PETITIONERS PROPERLY RAISED THE VIOLATION OF THEIR FEDERAL RIGHT OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT ACCORDING TO TEXAS LAW, SO THAT THE FEDERAL QUESTION IS BEFORE THIS COURT.

In its Brief in Opposition, the Respondent states that the federal due process question was never raised "in

any form or fashion" before any of the Texas trial or appellate courts (Brief in Opposition, pp. 5-6). The Respondent further states to this Court that the Petitioners improperly changed the basis of their appeal (Brief in in Opposition, p. 4). The Petitioners' Supplemental Brief to the Fourteenth Court of Appeals begins as follows:

> "Having requested and obtained leave of Court during oral argument on January 14, 1988, L. G. McCormick and Beacon Hill Farms, Inc., the Appellants, selectively supplement their oral argument and the argument contained in their Brief filed on July 3, 1987, as follows: . . . ."

(Appellants' Supplemental Brief, p. 1). No points of error were added. The Fourteenth Court of Appeals must have considered the Supplemental Brief, which contains much of the argument made to this Court, for if the Court of Appeals had stricken it, the Court was required to allow the Supplemental Brief "to be amended or supplemented." Tex. R. App. P. 74(o). The Supplemental Brief was duly filed.

In their Petition and accompanying Appendix (pp. 8-12), the Petitioners have presented to this Court varying methods by which they raised the federal question in the Texas courts. To clarify the basis for this Court's review jurisdiction, the Petitioners would call the Court's attention to the following:

1. In addition to the decision of the Fourteenth Court of Appeals having been expressly based on its misunderstanding of federal Constitutional law (Petition, p. 10), it is not clear from the face of the opinion that the

Fourteenth Court of Appeals' decision is "alternatively based on bona fide separate, adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1981); Appendix D to Petition, pp. 4a-14a. *Compare California v. Krivda*, 409 U.S. 33, 35 (1972) (when alternative state and federal grounds are clearly expressed in the opinion, this Court is unable to say with certainty that the state court judgment was not based on the state ground). The Petitioners believe the opinion of the Fourteenth Court of Appeals unequivocally rests on that court's misunderstanding of federal precedent, but even if the opinion were unclear or ambiguous, in the absence of a clear expression of the state ground on which the decision is based, this Court's jurisdiction to review the state action under the federal Constitution is unimpaired. *Michigan v. Long*, 463 U.S. at 1041. The mere possibility that the Texas Court of Appeals might have reached the same conclusion if it had decided the federal due process question purely as a matter of Texas law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question. *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973).

2. The necessary effect of the Texas judgment is to deny Petitioners' federal claim, and that is sufficient to preserve the federal question for review. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 61, 63 (1928).

3. From the outset, at trial and on appeal, the Petitioners have asserted the unfairness of the individual and cumulative errors committed by the trial court. (Appellants' Briefs to the Fourteenth Court of Appeals; Application for Writ of Error to the Supreme Court of Texas).

Any attack on the fundamental fairness of the trial due to cumulative error, and based on the cumulative impact of evidentiary rulings which would frustrate a defendant's ability to develop his defense, is an argument which properly preserves the federal question for review. *Chambers v. Mississippi,* 410 U.S. 284, 289-90 (1973).

4. The Respondent is unfamiliar with decisions of this Court which would permit the presentation of the Petitioners' federal claim when that claim has been raised by "clear implication" before the state courts (Respondent's Brief in Opposition, p. 12). *See, e.g., Webb v. Webb,* 451 U.S. 493, 496-97 (1981); *New York ex rel. Bryant v. Zimmerman,* 278 U.S. at 63. In addition, to prevent fundamental unfairness, this Court may apply its "plain error" doctrine to the Texas state courts, as well as to federal courts. *Webb v. Webb,* 451 U.S. at 502 (Powell, J., concurring); *Vachon v. New Hampshire,* 414 U.S. 478, 479 (1974). The record as a whole will confirm that the federal due process claim was clearly implicit in the Petitioners' objections to the trial court's rulings,[1] as well as being subsumed in other arguments on appeal. The express presentation of the federal question has been discussed in the Petition (pp. 10-11).

The authorities relied on by Respondent to contest the proper presentation of the federal claim in the courts below are not applicable. First, Respondent contends that under Texas law, Constitutional challenges must be expressly presented to the trial court in order to be considered on appeal, citing *Mynhier v. State,* 762 S.W.

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1. Statement of Facts, pp. 38-43, 56-58, 132-134, 227-233, 1080-1086, 1098-1138, 1205-1207, 1307-1314, 1382-1414, 1423-1425, 1448-1449, 1510-1512.

2d 662 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd). This case does not deal with the doctrine of fundamental error, and merely stands for the proposition that a complaint concerning the admission of evidence based on Texas Constitutional grounds must be consistent at trial and on appeal, and the basis urged at trial may not be modified on appeal. 762 S.W.2d at 665. In addition, Respondent contends that the fundamental error doctrine does not apply because any harm suffered by the Petitioners is unique to them and does not affect the public generally, relying on *Newman v. King*, 433 S.W. 2d 420 (Tex. 1968). *Newman* simply holds that the failure to appoint a guardian ad litem in a name change proceeding is not fundamental error when the minor is already represented by a guardian or next friend. 433 S.W.2d at 422. By contrast, in Texas a fourteenth amendment due process violation is of such magnitude that Texas law deems the error "fundamental" to the integrity of the trial, requiring automatic reversal. *Williams v. Capitol County Mutual Fire Ins. Co.*, 594 S.W.2d 558, 560 (Tex. Civ. App.—Fort Worth 1980, no writ).

The Petitioners have discussed the unexpected departure from Texas and federal precedent by the Fourteenth Court of Appeals (Petition, pp. 8-9, 15-16). When it became clear that the Fourteenth Court of Appeals was overruling Texas precedent and that the Texas Supreme Court was allowing that decision to stand, the federal claim was raised at the first opportunity. There is no doubt from the record that a claim under the federal Constitution was presented adequately, properly, and in due time under Texas law. *See Webb v. Webb*, 451 U.S. at 501; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. at 451, 453 (1930).

II. BY THEIR UNCONSTITUTIONAL CONSTRUCTION OF AN OTHERWISE VALID STATE RULE OF EVIDENCE, THE TEXAS COURTS HAVE DENIED THE PETITIONERS' RIGHT OF FEDERAL DUE PROCESS AND MUST HAVE DONE SO ON FEDERAL CONSTITUTIONAL GROUNDS.

The Respondent has missed the point of the Petitioners' request for certiorari. The merits of Respondent's claim and the Petitioners' counterclaim have not been drawn in issue. Rather, the Petitioners' complaint is that the Texas courts' misconstruction of a state rule of evidence has been used to deny their federal due process rights, and the denial of those rights prevented a valid trial on the merits. To be sure, the Fourteenth Court of Appeals did "discuss prior federal precedent" (Respondent's Brief in Opposition, p. 8), but the Court of Appeals did not understand those cases, or the rudiments of collateral estoppel, or the proof required to sustain McCormick's prior criminal conviction for conspiracy, or the wholly dissimilar elements of proof in the subsequent civil suit for check kiting. If collateral estoppel had been applicable, as the befuddled Texas courts thought, this case never would have been tried before a jury. By injecting the doctrine into the fact finding process, the Texas courts have created a confusing, as well as an incorrect, precedent. This Court can well ascertain that the Respondent's civil suit was, in actuality, not one for civil conspiracy to commit check kiting, but rather check kiting or fraud itself. It is true that the jury found that Petitioner McCormick conspired with another to kite checks (Special Issue No. 3, Petition Appendix, p. 68a), but the proximate cause and damage issues were not

based on the finding of a conspiracy, but rather on the completed act of check kiting. (Special Issues 4 and 5, Petition Appendix, pp. 68a-69a). The Respondent does not dispute this. (Respondent's Brief in Opposition, p. 11). In Texas, the essence of an action for civil conspiracy is damages, and to sustain a verdict for conspiracy, it is not enough that a conspiracy was formed. *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 856-58 (Tex. 1969); *Starling v. Hill*, 121 S.W.2d 648, 650 (Tex. Civ. App.—Waco 1938, no writ). For the reasons contained in the Petition (pp. 16-19), it is not possible to ascertain which facts actually were litigated in the earlier criminal case, but in any event, that conviction does not prove the receipt of money. No collateral estoppel arises.

The Respondent misunderstands the nature of the Petitioners' complaint in being prohibited from offering rebuttal testimony, stating that McCormick merely would have testified about a difference in "his personal trial strategy." (Respondent's Brief in Opposition, pp. 6, 11). The bill of exceptions (Petition Appendix H, pp. 57a-61a) shows that McCormick would have told the jury, *inter alia*, that the conviction almost ten years earlier was for conspiracy to commit theft and not check kiting, two entirely different causes of action involving different proof; that the sentence was probated; and that his lawyer in the criminal trial had been supported by the Bank and its lawyers in a political race. (Appendix, pp. 58a-60a). Because McCormick was not permitted to explain the circumstances of his conviction when that highly inflammatory fact was systematically hammered before the jury, he was prohibited from presenting an effective defense.

Because the trial court's judgment has been upheld by the Fourteenth Court of Appeals, and because there is no adequate and independent state ground on which the Court of Appeals' decision could rest, the case below must have been decided on federal Constitutional grounds. This case presents an important question touching the accommodation of state and federal interests under the federal Constitution, *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974), and the opinion of the Fourteenth Court of Appeals conflicts with those of all the other states, *Fuller v. Oregon,* 417 U.S. 40, 42 (1974). Therefore, Petitioners ask this Court to properly exercise its supervisory role over the courts of the State of Texas to achieve consistency, as well as a Constitutionally correct result.

CONCLUSION

For these reasons, and for those set out in the Petition for a Writ of Certiorari, the Petitioners request that certiorari be granted, that the judgment of the Fourteenth Court of Appeals be reversed, and that this case be re-tried in accordance with federal Constitutional safeguards.

Respectfully submitted,

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June 12, 1989

CERTIFICATE OF SERVICE

I, Linda Lelia Susan Moroney, a member of the bar of this Court, certify that on this 12th day of June, 1989, three copies of the Petitioners' Reply Brief were mailed, first class postage prepaid, to the person listed below, and that all parties required to be served have been served.

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